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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NEW YORK UNIVERSITY,

Petitioner,

v.

SUSAN ROGERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should an action under the Americans with Disabilities Act and the Family and Medical Leave Act be stayed because the issues are referable to arbitration under a collective bargaining agreement, pursuant to the Federal Arbitration Act?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, New York University, is a not for profit education corporation under the laws of the State of New York. New York University has no parent corporation and issues no stock.

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Appendix B — Memorandum And Order Of The United States District Court For The District Of New York Dated September 9, 1999 And Filed September 10, 1999 ..... 9a

Petitioner respectfully petitions for a writ of certiorari to review the order of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion (App. A) is reported at *Rogers v. New York University*, 220 F.3d 73, 164 LRRM (BNA) 2854, 6 Wage & Hour Cas. 2d (BNA) 379 (2d Cir. 2000). The district court opinion (App. B) is reported at *Rogers v. New York University*, 162 LRRM (BNA) 2294, 6 Wage & Hour Cas. 2d (BNA) 375 (S.D.N.Y. 1999).

STATEMENT OF JURISDICTION

The order of the Second Circuit Court of Appeals was entered on July 17, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which provides, in section 3, 9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been

had in accordance with the terms of the agreement, providing the applicant for the stay is not in *default in proceeding* with such arbitration.

STATEMENT OF THE CASE

The respondent Susan Rogers is a former employee of the petitioner New York University who alleges causes of action under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1343(a)(4) (civil rights), and 29 U.S.C. § 2617(a)(2) (FMLA).

The University made a motion to stay the action and refer the issues to arbitration in accordance with section 3 of the Federal Arbitration Act (FAA). The district court denied the motion. The University appealed in accordance with section 16(a)(1)(A) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(A). The court of appeals affirmed.

The FAA requires in mandatory terms that a district court stay any action in which any issue in the suit is referable to arbitration under a written agreement. The claims in this case are referable to arbitration in the clearest of terms. Under the applicable collective bargaining agreement, claims of violations of federal laws against disability discrimination, as well as alleged violations of the FMLA, are subject to arbitration.[1]

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1. There is presently pending before this Court the issue of the applicability of the FAA to contracts of employment. *Circuit City Stores v. Adams*, 120 S. Ct. 2004 (May 22, 2000) (No. 99-1379). This was not an issue in the present case in the courts below.

(Cont'd)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT

The decisions of this Court have strongly endorsed the policies underlying the Federal Arbitration Act. This Court has emphasized that parties to arbitration agreements are encouraged by the FAA to have disputes removed from the courts "and into arbitration as quickly and easily as possible". *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Congress' "preeminent concern" in passing the FAA was to enforce agreements to arbitrate. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985).

(Cont'd)

The FAA, in section 1 (9 U.S.C. § 1), provides in part, ". . . nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Most Circuits, like the Second Circuit, have held that this exclusion applies only to employees in the transportation industries. *Eg. Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997); *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995). The Ninth Circuit has held to the contrary. *Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998).

The prior decisions of this Court under the FAA have established that statutory claims, in general, are subject to arbitration by written agreement. *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc.*, 473 U.S. 614 (1985) [Sherman Act]; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) [Securities Acts]; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) [RICO]. This Court fully relied upon the principles of these cases in deciding *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, this Court, in expansive terms, held that, under a written agreement, claims under the Age Discrimination in Employment Act (ADEA) were required to be arbitrated. The Court in *Gilmer* found that the substantive objections to the arbitration of statutory claims were outdated and inconsistent with the statutory and policy endorsement of arbitration as a preferred method of dispute resolution. *Id.* at 28-30.

Amidst the strong endorsement by this Court of arbitration under the FAA, an anomaly, illustrated by the opinions below, has developed in the lower courts concerning the arbitration of statutory employment claims under collective bargaining agreements. This Court recently has recognized this anomaly and provided valuable direction on its resolution in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). In *Wright*, this Court considered "the question whether a general arbitration clause in a collective bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act. . .". *Id.* at 72. In doing so, this Court observed that this issue "brings into question two lines of our case law", represented by *Gilmer*, *supra* and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). *Id.* at 75. In *Gardner-Denver*, this Court held that an

arbitration award under a collective bargaining agreement's non-discrimination clause (which did not incorporate statutory provisions) did not bar a subsequent suit under Title VII of the Civil Rights Act of 1964. The Court acknowledged in *Wright* that "[t]here is obviously some tension between these two lines of cases." *Id.* at 76.

That "tension" could not be resolved definitively by the Court in *Wright* — as it can be in this case — because the CBA in *Wright* had no non-discrimination provision at all and "contains no explicit incorporation of statutory anti-discrimination requirements." 520 U.S. at 80. The Court in *Wright* recognized that *Alexander v. Gardner-Denver* had lost at least some of its vitality and noted "whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." *Id.* The Court did not uphold the lower court's dismissal in *Wright* because the CBA did not contain "a clear and unmistakable incorporation of employment-discrimination laws." *Id.* at 81. The employer's argument in *Wright* regarding the rather general provisions of the CBA was found wanting by the Court because "that is not the same as making compliance with the ADA a commitment that would be subject to the arbitration clause." *Id.* The Court also noted that "[i]t may well be that ordinary textual analysis of the CBA will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration", but the Court would not presume that to be the case. *Id.* at 79.

In this case, the CBA provisions at issue hardly could be more explicit. Federal anti-discrimination statutory provisions are clearly incorporated in the agreement and alleged violations are subject to arbitration. The "ordinary textual analysis" referred to by this Court in *Wright* compels the conclusion that the issues are referable to arbitration. Unlike *Wright*, the CBA here *does* contain the "explicit incorporation of statutory anti-discrimination requirements."

The CBA in this case provides that "There shall be no discrimination as defined by applicable Federal, New York State and New York City laws . . ." (App. p. 2a), and that "Employees are entitled to all provisions of the Family and Medical Leave Act of 1993 that are not specifically provided for in this Agreement" (App. p. 2a). The Court in *Wright* gave valuable and explicit guidance on the question of what type of contractual provisions would require arbitration. Those are the provisions before this Court in this case, an agreement with the "explicit incorporation of statutory anti-discrimination requirements," to which the Court in *Wright* referred.

The uncertainty in the lower courts is reflected in the Second Circuit's opinion here. The Second Circuit's "Reason #1" for its opinion (App. p. 3a) relies exclusively upon *Gardner-Denver* without reference to this Court's guidance in *Wright*.[2] The Court's "Reason #2" construes this Court's

2. While the court below reads *Gardner-Denver* as a sweeping prohibition on the arbitration of statutory claims under a collective bargaining agreement, this Court in *Gardner-Denver*, while holding that an arbitration award would not bar a subsequent action, clearly recognized, and strongly endorsed, that arbitration under collective bargaining agreements did and would continue to resolve many claims of employment discrimination. 415 U.S. at 55.

guidance in *Wright* so narrowly as to make it virtually indistinguishable from its "Reason #1".

The Court below grafted on to this Court's statement in *Wright* that there be an "explicit incorporation of statutory anti-discrimination requirements" the condition, not set forth in *Wright*, that the collective bargaining agreement identify "the anti-discrimination statutes by name or citation" (App. p. 7a). The collective bargaining agreement provision here ("There shall be no discrimination as defined by applicable Federal . . . laws") is more effective than the rote recitation of statutory citations (which may have little meaning to employees consulting the text) and has the further advantage of incorporating anti-discrimination requirements as they may be amended or as new statutory provisions are adopted from time to time.

The provisions of the CBA in this case, clearly incorporating statutory claims, provides this Court with the opportunity, not present in *Wright*, to decide whether such provisions in CBAs are effective, particularly in view of Congress' endorsement of the arbitration of ADA claims.[3]

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3. The American with Disabilities Act, in 42 U.S.C. § 12212, provides: ". . . where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter."

II.

THE CIRCUITS ARE IN CONFLICT AND THE QUESTION IS IMPORTANT

Collective bargaining agreements in the United States customarily include non-discrimination clauses and comprehensive arbitration provisions. As the court below noted (App. p. 4a) the majority of Circuits appear to adhere to an interpretation of this Court's opinion in *Gardner-Denver* which makes virtually any agreement to arbitrate these claims not effective. Most of these Circuit decisions came before this Court's opinion in *Wright*. The Fourth Circuit has held to the contrary, enforcing the agreements, as would be the case with virtually any other subject matter covered by the FAA. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

The petition here presents the Court with the important opportunity to decide the question not presented squarely in *Wright* and to harmonize this area of the law with the Court's arbitration jurisprudence.

CONCLUSION

For the reasons set forth above, the petition for a writ certiorari should be granted.

Respectfully submitted,

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October, 2000

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 17, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1999

(Argued: April 7, 2000 Decided: July 17, 2000)

Docket No. 99-9172

SUSAN ROGERS,

Plaintiff-Appellee,

– v. –

NEW YORK UNIVERSITY,

Defendant-Appellant.

Before: VAN GRAAFEILAND and PARKER, *Circuit Judges*, and UNDERHILL,* *District Judge.*

Appeal from an order of the United States District Court for the Southern District of New York denying defendant's motion for a stay pending arbitration.

Affirmed.

* * *

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* Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

Appendix A

PER CURIAM:

In January 1993, Susan Rogers began work for New York University ("NYU") as a clerical employee. A collective bargaining agreement ("CBA") between NYU and Local 3882, United Staff Association of NYU, NYSUT, AFT, AFL-CIO, governed the terms and conditions of Rogers's employment. The CBA contains a "no discrimination" provision, which states that "[t]here shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability. . . ." The CBA also provides that "[e]mployees are entitled to all provisions of the Family and Medical Leave Act of 1993 ["FMLA"] that are not specifically provided for in this agreement." A separate grievance and arbitration clause in the CBA provides in substance that disputes arising under the agreement shall be arbitrated.

Asserting medical disorders, Rogers received medical leave under the FMLA on or about August 22, 1997. Allegedly because Rogers's FMLA medical leave time had expired, NYU terminated Rogers on November 17, 1997. On December 15, 1997, Rogers filed a charge of discrimination against NYU with the Equal Employment Opportunity Commission ("EEOC"). On January 13, 1998, the EEOC issued Rogers a right to sue letter, informing her that she could sue NYU in federal court. Rogers commenced the instant action in the Southern District of New York on March 25, 1998. In an amended complaint filed on January 20, 1999, Rogers asserted that NYU had discriminated against her in violation of the Americans with Disabilities

Act ("ADA"), the FMLA, and New York State and City human rights laws.

On April 21, 1999, NYU moved, pursuant to § 3 of the Federal Arbitration Act ("FAA"), to stay Rogers's action. In a memorandum and order dated September 9, 1999, District Judge William H. Pauley, III denied NYU's motion. As Judge Pauley correctly observed, there were two slightly different reasons for denying the stay, either one of which would suffice.

DISCUSSION

The Second Circuit reviews *de novo* a district court order that denies a motion to stay an action pending arbitration. *Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601, 604 (2d Cir.1991).

A. Reason # 1

By requiring arbitration, the CBA in the instant case purports to waive Rogers's right to a federal forum. Such arbitration clauses, however, are not always enforceable. In 1974, the Supreme Court held that a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a CBA was not precluded from bringing an action in federal court based on the same conduct. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974); *see Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745-46 (1981) (concluding, consistent with *Gardner-Denver*, that union cannot waive employee's statutory rights under Title VII). Several years later, the Court

narrowed the reach of *Gardner-Denver*. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-35 (1991), the Court held that an employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate an age discrimination claim.

Following *Gilmer*'s lead, most lower courts have focused on the party negotiating the waiver of rights. When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies.[1] The Second Circuit is no exception. *See Tran v. Tran*, 54 F.3d 115, 117-18 (2d Cir.1995) (relying on *Barrentine* and *Gardner-Denver* to conclude that employer could not compel union employee to arbitrate federal statutory claims even though CBA required arbitration). Only the Fourth Circuit has concluded otherwise. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-86 (4th Cir.1996) (holding that CBA requiring arbitration of union member's statutory discrimination claims is enforceable).

The arbitration provision in the instant case, by which employees purport to waive their right to a federal forum

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1. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-86 (D.C.Cir.1999), *judgment reinstated*, __ F.3d __, 2000 WL 567099 (D.C. Cir. 2000) (*en banc*); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630-32 (6th Cir.1999); *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 760-62 (9th Cir.1998), *cert. denied*, 120 S. Ct. 39 (1999); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 522-27 (11th Cir.1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1451-54 (10th Cir.1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363-65 (7th Cir.1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

with respect to statutory claims, is contained in a union-negotiated CBA. Under *Gardner-Denver*, to which this Court and a majority of others adhere, such provisions are not enforceable. Because an order staying Rogers's suit would be akin to an order compelling arbitration, the district court correctly denied NYU's motion to stay Rogers's federal action pending arbitration.

B. Reason # 2

Although the *Gardner-Denver* rule is sufficient to decide this case, we also address the Supreme Court's recent decision in *Wright v. Universal Maritime Service Corporation*, which could be taken to suggest that, under certain circumstances, a union-negotiated waiver of an employee's statutory right to a judicial forum might be enforceable. *See* 525 U.S. 70, 80-81 (1998). As the district court correctly concluded, such circumstances are not present here. Furthermore, while *Wright* may have called *Gardner-Denver* into question, it did not overrule it.

In *Wright*, the Court, without addressing the issue of enforceability, stated that, as a condition precedent to enforceability, CBAs, unlike employment contracts executed by individual employees, that purport to waive an employee's right to bring discrimination claims in federal court must be clear and unmistakable. *Id.* at 80. In *Wright*, a longshoreman who belonged to a union sued his employer under the ADA. *Id.* at 72-75. The CBA governing the plaintiff's employment provided that disputes arising out of the CBA would be arbitrated. *Id.* at 73. The Supreme Court stated that a waiver of statutorily conferred rights in a CBA must be explicit.

Id. at 80. Noting the broad language of the arbitration clause and that the CBA did not specifically incorporate pertinent statutory antidiscrimination requirements and make compliance therewith a contractual commitment, the Court concluded that the waiver of the right to a federal forum was not clear and unmistakable. *Id.* at 80-82. Because the waiver was not explicit, the Court declined to consider whether clear and unmistakable waivers are enforceable. *Id.* at 82.

Subsequent to *Wright*, other courts have determined that a waiver of statutorily conferred rights contained in a CBA is sufficiently clear and unmistakable if either of two conditions is met. First, a waiver is sufficiently explicit if the arbitration clause contains a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331-32 (4th Cir.1999); *see Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631 (6th Cir.1999) (discussing *Wright* test); *Giles v. City of New York*, 41 F. Supp. 2d 308, 311-12 (S.D.N.Y. 1999) (same); *Beason v. United Techs. Corp.*, 37 F. Supp. 2d 127, 130 (D. Conn.1999) (same). The arbitration clause at issue in the instant case is broad and general. It encompasses "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement." This degree of generality falls far short of a specific agreement to submit all federal claims to arbitration.

Second, a waiver may be sufficiently clear and unmistakable when the CBA contains an explicit incorporation of the statutory anti-discrimination requirements" in addition to a broad and general arbitration

clause. *Carson*, 175 F.3d at 332. Thus, "[i]f another provision, like a nondiscriminatory clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims." *Id.* Courts agree that specific incorporation requires identifying the antidiscrimination statutes by name or citation. *Bratten*, 185 F.3d at 631; *Prince v. Coca-Cola Bottling Co. of N.Y.*, 37 F.Supp.2d 289, 293 (S.D.N.Y.1999). Moreover, as the Supreme Court stated in *Wright*, the CBA should make compliance with the named or cited statute a contractual commitment that is subject to the arbitration clause. *Wright*, 525 U.S. at 81; *see Prince*, 37 F.Supp. 2d at 293 (citing *Wright*, 525 U.S. at 81).

The instant Agreement contains both a general arbitration clause and a nondiscrimination provision. However, neither incorporates anything explicitly. Furthermore, while the Agreement's "leave of absence" clause does create contractual rights coextensive with the FMLA, the collective bargaining agreement does not specifically make compliance with *the FMLA* a contractual commitment that is subject to the arbitration clause. As the Supreme Court noted in *Wright*, incorporating federal laws into a collective bargaining agreement merely "creat[es] a contractual right that is coextensive with the federal statutory right." *Wright*, 525 U.S. at 79. However, the Court went on to note that creating coextensive rights "is not the same as making compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause." *Id.* at 81.

Appendix A

The foregoing analysis of reason number two reveals that waiver in the instant case is not clear and unmistakable. The CBA does not contain a provision whereby employees explicitly agree to submit all federal claims to arbitration. Moreover, the CBA does not satisfactorily incorporate federal antidiscrimination law both because reference to such law is too broad and because the CBA does not explicitly make compliance with that law a contractual commitment that is subject to the arbitration provision.

The order of the district court is affirmed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW YORK DATED SEPTEMBER 9, 1999 AND FILED SEPTEMBER 10, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 2089 (WHP)

SUSAN ROGERS,

Plaintiff,

-against-

NEW YORK UNIVERSITY,

Defendant.

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff Susan Rogers ("Rogers") commenced this action on March 25, 1998 against Defendant New York University ("NYU") asserting claims under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq., as amended, the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601 et seq., and the State Human Rights Law, Executive Law §§ 290 et seq., and the Administrative Code of the City of New York, §§ 8-101 et seq. On May 6, 1999, NYU moved to stay the present action and compel arbitration pursuant to Section 3 of the Federal

Arbitration Act ("FAA"), 9 U.S.C. § 3. Upon consideration of the parties' submissions and after hearing oral argument, the defendants' motion to stay the action and compel arbitration is denied.

Background

Rogers was employed by NYU as an Administrative Assistant at NYU's School of Education from January 1993 to November 17, 1997 when she was terminated. (Compl. ¶ 9, .) Rogers suffers from a post-traumatic stress disorder and a borderline personality disorder with paranoid ideation. (Compl. ¶ 10.) On or about August 22, 1997, Rogers received medical leave under the FMLA. (Compl. ¶ 13.)

The terms and conditions of Roger's employment are governed by a collective bargaining agreement (the "Agreement") between NYU and Local 3882, United Staff Association of NYU, NYSUT, AFT, AFL-CIO. The Agreement contains a "no discrimination" clause which states that "[t]here shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability . . ." The Agreement also contains a "leave of absense" clause under which employees are entitled to all provisions of the FMLA that are not specifically provided for in the Agreement.

The grievance and arbitration procedure under the Agreement is governed by Article XXXII which requires that any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of the Agreement be arbitrated.

Appendix B

Discussion

The precise issue presented in defendant's motion is whether the union's waiver of Roger's statutory right to a federal forum was clear and unmistakable. To answer this question, a brief review of the Supreme Court's teachings in *Gardner-Denver*, *Gilmer*, and *Wright* is necessary.

In *Gardner-Denver*, the Court held that a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was not precluded from bringing a Title VII action based on the same conduct underlying the grievance. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Gilmer*, the Court held that an employee's claim under the Age Discrimination in Employment Act of 1967 ("ADEA") can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application in which the employee agreed to arbitrate any dispute, claim, or controversy arising between him and the defendant arising out or the employment or termination of employment. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22 (1991).

In reconciling the two cases, lower courts have noted that in *Gilmer*, the employee, in his individual capacity, contractually agreed to arbitrate his statutory claims, whereas in *Gardner-Denver*, the employee was represented by a union through a collective bargaining agreement. Accordingly, some courts have held that agreements to arbitrate in collective bargaining agreements do not waive any potential individual statutory remedies. *See Wilkinson v. New York Telephone Co.*, 1995 WL 87257, at *4 n. 5 (E.D.N.Y. Feb.

16, 1995), *aff'd*, 71 F.3d 405 (2d Cir. 1995); *accord Kirkendall v. United Parcel Service, Inc.*, 964 F.Supp. 106, 108 n.2 (W.D.N.Y. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363-64 (7th Cir. 1997) (Posner J.); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478 (D.C.Cir. 1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996). *But see Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432, 136 L.Ed.2d 330 (1996). These courts reasoned that when the arbitration agreement is negotiated by the individual employee, he is free to waive his rights to a judicial forum. However, when a union negotiates a collective bargaining agreement containing a broad arbitration clause, it cannot waive an individual employee's statutory right to be free from discrimination.

The Supreme Court addressed this precise issue in *Wright v. Universal Maritime Serv. Corp.*, 119 S.Ct. 391 (1998). The issue presented in *Wright* was whether a general arbitration clause in a collective bargaining agreement requires an employee to use the arbitration procedure for a violation of the ADA. The Court held that it did not. The Court began by noting that the broad presumption of arbitrability found in the Labor Management Relations Act ("LMRA") did not extend to a claim under the ADA. The Court emphasized that in order for a union to waive an employee's rights to a federal judicial forum for statutory anti-discrimination claims, the agreement to arbitrate such claims must be clear and unmistakable. *Wright*, 119 S.Ct. at 396; *accord Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines*, 167 F.3d 764, 767 (2d Cir. 1999). Finding that there was no clear and

unmistakable waiver, the Court did not reach the issue of whether such a waiver would be enforceable. *Id.* at 397.

Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, provides that the court must stay the trial of an action until arbitration has been completed if the action concerns "any issue referable to arbitration" under a written agreement for such arbitration. 9 U.S.C. § 3; *See McMahan Secs. Co. L.P. v. Forum Capital Markets, L.P.*, 35 F.3d 82, 85 (2d Cir. 1994); *Dean Witter Reynolds Inc v. Byrd*, 470 U.S. 213, 218 (1985). Section 1 of the FAA contains an exclusion for "contracts of employment of seamen, railroad employees, or any other class of employees engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Second Circuit has interpreted this exclusion as limited to employees in the transportation industries. *See Maryland Causalty Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *accord Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995) *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *United Food & Commericial Workers Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992); *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997). *Contra Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998). Accordingly, because Rogers is an employee in a service industry which affects commerce, and is not engaged in the transportation industry, the FAA is applicable to this action.

The Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., establishes a liberal policy in favor of arbitration. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d

655, 664 (2d Cir. 1997) (Pollack J. by designation). In *Wright*, where the employee's claim involved the interpretation of a federal statute, as opposed to a collective bargaining agreement, the Court noted that an arbitrator was not better qualified than a court to resolve the dispute. *Wright*, 119 S.Ct. at 395. Similarly because Rogers's claims arise under the ADA and the FMLA, the FAA's broad presumption of arbitrability is inapplicable. *See Wright*, 119 S.Ct. at 395 n.1.

Defendant's reliance on *Gilmer* is misplaced. In *Gilmer*, the employee, as required by his employment, registered as a securities representative with several stock exchanges. His registration application included a broad arbitration clause under which the employee "agreed to arbitrate any dispute, claim or controversy" arising between him and [his employer]." The Court emphasized that when a party has made an agreement to arbitrate, it should be held to it "unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," in this case, rights under the ADEA. *Gilmer*, 500 U.S. at 26. Noting that nothing in the text or legislative history of the ADEA precluded arbitration, and finding that there was no inherent conflict between arbitration and the underlying purposes of ADEA, the Court affirmed the order compelling arbitration.

In contrast, in this action, Rogers did not negotiate and sign a contract; rather, a union bargained for and signed a collective bargaining agreement on her behalf. The *Gilmer* court recognized the importance of this fact. First, when an employee submits his grievance to arbitration, he is attempting to vindicate his contractual rights under the

collective bargaining agreement. On the other hand, when an employee brings an action under a federal statute, he is seeking redress of independent statutory rights conferred by Congress. *Gilmer*, 500 U.S. at 36. Second, in the context of a collective bargaining agreement, the individual interest of an employee may be subordinated to the collective interest of all employees in the bargaining unit. *Gilmer*, 500 U.S. at 51. Because of the risk of conflict between employee and union interests, a union cannot consent to arbitration on behalf of an employee by signing a collective bargaining agreement that assigns the enforcement of statutory rights to the union-controlled grievance and arbitration procedure. *See also Lynch v. Pathmark Supermarkets*, 987 F.Supp. 236, 241 (S.D.N.Y. 1997) (*citing Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997)). *But see Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (barring employee from bringing Title VII and ADA claims in federal court when collective bargaining agreement required all employment disputes to be arbitrated). Third, an arbitrator's authority extends only to disputes that the parties intended to arbitrate, and not to public laws that conflict with the benefit of the bargain between the parties. *Gilmer*, 415 U.S. at 36.

Because of the presence in this action of the tension between the collective interests of the union and the employee's individual interest, this Court notes that *Wright* is more on point. In *Wright*, the employee, a longshoreman who belonged to a union, sued his employer under the ADA. A clause in the collective bargaining agreement provided that the agreement was "intended to cover all matters affecting wages, hours, and other terms and conditions of

employment", and another clause provided that "no part or provision of the Agreement shall be violative of any Federal or State Law." The collective bargaining agreement also contained a broad arbitration clause under which "[a]ny dispute arising out of the terms and conditions of [the] Agreement, or dispute involving the interpretation or application of [the] Agreement . . ." would be arbitrated. *Wright*, 119 S.Ct. at 393. Noting that the arbitration clause was very general, providing only for arbitration of "matters under dispute," and the remainder of the collective bargaining agreement did not explicitly incorporate statutory anti-discrimination requirements, the Court found the waiver was not clear and unmistakable. *Wright*, 119 S.Ct. at 397. Thus, the Court did not reach the secondary question of whether a clear and unmistakable waiver is enforceable.

This Court need not reach this question either because the union-negotiated waiver in this action was not clear and unmistakable. "Broad, general language is not sufficient to meet the level of clarity required to effect a waiver in [the context of] a collective-bargaining agreement." *Carson v. Giant Food, Inc.*, No. 97-2240, 1999 WL 254438, at * 6 (4th Cir. Apr. 29, 1999) (Wilkinson J.) The appropriate level of clarity can be achieved by two different approaches.

Under the first approach, the collective bargaining agreement must contain a clear and unmistakable provision under which employees agree to submit to arbitration all federal causes of action arising out of their employment. *Carson*, 1999 WL 254438, at *6. Here, the arbitration clause is both broad and general, requiring that any dispute concerning the interpretation, application, or claimed

violation of a specific term or provision of the Agreement be arbitrated. Thus, it cannot be clearly and unmistakably said that NYU employees agreed to submit all federal causes of action to arbitration. *See Giles v. City of New York*, 41 F.Supp.2d 308, 311-12 (S.D.N.Y. 1999) (Motley J.) (no waiver when arbitration clause did not clearly and unmistakably include statutory claims.); *accord Bratten v. SSI Services, Inc.*, No. 97-6159, 1999 WL 529409, at *4 (6th Cir. Jul. 23, 1999).

Under the second approach, the collective bargaining agreement must contain an "explicit incorporation of the statutory anti-discrimination requirements" in addition to a broad and general arbitration clause. If another provision such as a "non-discrimination" clause makes it unmistakably clear that certain statutes are part of the agreement, then employees will be bound to arbitrate their federal claims. *Carson*, 1999 WL 254438 at *6. In *Prince v. Coca-Cola Bottling Co. of N.Y.*, 37 F.Supp.2d 289 (S.D.N.Y. 1999) (Conner J.), the collective bargaining agreement contained a broad, general arbitration clause and an anti-discrimination clause which stated that "neither the [c]ompany nor the [u]nion will discriminate against any employee . . . because of race, creed, . . . as defined under the New York Laws and Federal Laws . . ." *Prince*, 37 F.Supp.2d at 293. Nonetheless, the court found that the anti-discrimination provision did not "clearly and unmistakably constitute an explicit incorporation of the statutory anti-discrimination requirements" because "it did not identify the statutes by name or citation, and failed to make compliance with the statutes a contractual commitment that would be subject to the arbitration clause." *Prince*, 37 F.Supp.2d at 293;

see Bratten, 1999 WL 529409, at *4 (holding that district court had jurisdiction over plaintiff's ADA claim because ADA statute was not specifically mentioned in the collective bargaining agreement). Here, the Agreement contains a similar "non-discrimination" clause, which states that "[t]here shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, . . ." Because the clause fails to identify the ADA by name or citation, it cannot be said the clause clearly and unmistakably constitutes an explicit incorporation of the ADA. Accordingly, the union-negotiated waiver of Rogers' ADA claim was not clear and unmistakable.

The Agreement also contains a "leave of absence" clause which states that employees are entitled to all provisions of the FMLA that are not specifically provided for in the Agreement. Although the statute is mentioned by name, compliance with the FMLA has not been made a contractual commitment that is subject to the arbitration clause; the clause states only that employees are entitled to the FMLA. *See Prince*, 37 F.Supp. at 293; *Brown v. Air Freight Sys., Inc.*, No. 98-1354, 1999 WL 496238, at *2 (4th Cir. Jul. 13, 1999). In *Brown*, the non-discrimination clause stated in part that "[t]his Article also covers employees with a qualified disability under the Americans with Disabilities Act." The court found that the clause merely added disability to the list of grounds upon which the parties agreed not to discriminate, and did not incorporate the ADA. Similarly, the "leave of absence" clause in this action merely reiterates that employees are entitled to certain rights under the FMLA, but does not clearly and unmistakably incorporate the FMLA as part of the collective bargaining agreement. Accordingly, the union-negotiated waiver of Rogers' FMLA claim was not clear and unmistakable.

Appendix B

Conclusion

For the reasons set forth above, defendant's motion to stay the action and compel arbitration is denied. Counsel are directed to appear before this Court on October 1, 1999 at 9:30 a.m. for a further pretrial conference.

Dated: September 9, 1999
New York, New York

SO ORDERED:

s/ William H. Pauley
WILLIAM H. PAULEY III
U.S.D.J.

(2)

No. 00-540

Supreme Court, U.S.
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In The

Supreme Court of the United States

NEW YORK UNIVERSITY,

Petitioner,

v.

SUSAN ROGERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The legal question raised by petitioner's writ is whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, requires respondent's statutory employment claims to be arbitrated based on the provisions contained in petitioner's collective bargaining agreement. Petitioner, after presenting some of this Court's decisions regarding the Federal Arbitration Act, concludes, in part, that granting the petition will permit this Court to "harmonize this area of the law with the Court's arbitration jurisprudence." Pet. Brief at 8.[1] Petitioner also argues that the contractual language in its collective bargaining agreement provides the predicate for this Court to essentially reverse the long-standing doctrine set forth in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). Pet. Brief at 5.

Petitioner's writ should be denied for three reasons: (1) the Court below did not address the Federal Arbitration Act; (2) the actual language of petitioner's collective bargaining agreement contains, as the Court below found, an insufficient waiver based on the legal standard set forth in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998); and (3) there is no significant split among the circuits regarding the continuing effect of the *Gardner-Denver* doctrine by which waivers contained in collective bargaining agreements are considered by a different legal standard from those contained in individual employment contracts.

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[1] All references to petitioner's brief are indicated by "Pet. Brief at ___" and to petitioner's appendix by "Pet. App. ___", with the page number(s) inserted.

I

THE DECISION BELOW DOES NOT ADDRESS THE QUESTION RAISED BY THE PETITION REGARDING THE FEDERAL ARBITRATION ACT

The Court below essentially divided its analysis into two sections. First, the Court below examined the continuing vitality of *Gardner-Denver, supra,* within the Second Circuit and also in other circuits. Next, the Court considered whether the alleged waiver in petitioner's collective bargaining agreement was "clear and unmistakable" within the meaning of *Wright, supra.* Nowhere did the Court below engage in any analysis regarding the Federal Arbitration Act. In fact, the Court below makes no reference to the Federal Arbitration Act except to acknowledge that petitioner had originally filed its motion to stay the judicial proceeding and compel arbitration pursuant to said Act. Pet. App. 3a.

II

THE COLLECTIVE BARGAINING AGREEMENT CONTAINS NO "CLEAR AND UNMISTAKABLE" WAIVER WITHIN THE MEANING OF *WRIGHT*

The Court below concluded that petitioner's collective bargaining agreement with respondent's former labor union fails to contain any explicit waiver of respondent's right to file her anti-discrimination and Family and Medical Leave Act ("FMLA") claims in court. Employing the analysis contained in *Wright,* the Court below first examined the collective bargaining agreement's arbitration clause and then the agreement's references to the specific statutes in question.

As observed by the Court below, the collective bargaining agreement contains only a general arbitration clause which covers "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement." Pet. App. 6a. The Court below, relying on *Wright* and some of its progeny, concluded that such a "broad and general" arbitration clause failed to serve as an explicit waiver: "The degree of generality falls *far short* of a specific agreement to submit all claims to arbitration." Pet. App. 6a (emphasis added).

The collective bargaining agreement's anti-discrimination provision is also nonspecific. Said provision provides: "There shall be no discrimination as defined by applicable Federal, New York State and New York City Laws. . . . " Pet. App. 2a. Again employing this Court's *Wright* analysis, the Court below observed that the labor agreement's general reference to anti-discrimination did not evince an explicit incorporation of said anti-discrimination provision into the agreement that would make it "subject to the arbitration clause." Pet. App. 7a.

In addition, the collective bargaining agreement's "leave of absence" provision only makes reference to the FMLA and states that employees are entitled to certain rights under the FMLA. Pet. App. 18a. The Court below stated that this reference to the FMLA does not "specifically make compliance with the FMLA a contractual commitment which is subject to the arbitration clause". Pet. App. 7a. The Court below cited *Wright* for the proposition that a collective bargaining agreement's mere reference to such laws only " 'creat[es] a contractual right that is coextensive with the federal statutory right' " and that creation of coextensive rights " 'is not the same as making

compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause.' " Pet. App. 7a, *quoting from, Wright*, 525 U.S. at 79 and 81.

Thus the Court below employed this Court's *Wright* analysis regarding the adequacy of the alleged waiver in petitioner's collective bargaining agreement. Based on *Wright*'s direction that any such waiver be "explicit", the Court below concluded that the arbitration clause herein fell "far short" of this Court's standard. The Court below also found that the collective bargaining agreement's references to anti-discrimination failed to incorporate any such laws into the agreement and that its reference to the FMLA merely created a contractual, "co-extensive" right, and that such statutory references did not satisfy *Wright*'s "clear and unmistakable" standard for committing such provisions to arbitration.

III

NO SIGNIFICANT SPLIT IN THE CIRCUITS EXISTS REGARDING THE APPLICATION OF THE *GARDNER-DENVER* DOCTRINE

Gardner-Denver, which addresses whether a collective bargaining agreement may waive a union member's right to file her statutory employment claims in court, has remained "good law" for twenty-six years. When this Court decided in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) that individual employment contracts could waive an employee's right to file statutory employment claims in federal court, virtually all courts thereafter distinguished *Gardner-Denver* from *Gilmer* by contrasting collective bargaining agreements and individual employment contracts. The Court below observed that the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) has stood alone

in blurring this distinction between waivers contained in these two types of employment contracts. Pet. App. 4a. Petitioner too acknowledges that only the Fourth Circuit has rejected the prevailing view that a waiver contained in a collective bargaining agreement should be treated differently from one contained in an individual employment contract. Pet. Brief at 8.[2]

The decision reached by the Court below, regarding the alleged waiver of a judicial forum contained in petitioner's collective bargaining agreement, is consistent with the nearly unanimous view among the circuits which is rooted in the *Gardner-Denver* doctrine. The Second Circuit's decision is not in conflict with virtually any other circuit.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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[2] Even the Fourth Circuit – post-*Wright* – has retreated from the seemingly absolute position it advanced in *Austin, supra,* that waivers contained in collective bargaining agreements are enforceable to require arbitration of a union member's statutory anti-discrimination claims. *See Carson v. Giant Food, Inc.,* 175 F.3d 325, 331 (4th Cir. 1999) and *Brown v. ABF Freight Systems Inc.,* 183 F.3d 319, 321 (4th Cir. 1999) (in which the Fourth Circuit adopted *Wright*'s "clear and unmistakable" standard for such waivers).